No. 11,891

IN THE

United States Court of Appeals

For the Ninth Circuit

ERNEST TSANG,

Appellant,

vs.

JOHN JOSEPH KAN,

Appellee.

Appellant's Reply Brief

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PREFACE

We have been served with a "Brief for Appellee." A reading of it leads us to the conclusion it best could be designated as "Confession of Error and Stipulation for Reversal."

The outstanding phase of this document is that it deeply submerges within its covers* its only treatment on the subject of Res Judicata, the appellant's primary and cardinal point of appeal.

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*Only two pages (pages 26 and 27) in a forty page brief.

The Appellant's Opening Brief devotes more than half of its volume (pp. 7-15) to "ARGUMENT (1) The Judgment Appealed from is Contrary to Law in That the Judgment of the State Court Was Res Judicata."

As just noted, the almost imperceptible reply thereto is contained in but two pages and consists only of one (1) citation, that entirely inapposit.

THE RELIEF GRANTED BY THE DISTRICT COURT WAS BARRED BY RES JUDICATA

It is immediately apparent from his lack of denial, Appellee concedes the basic elements of the plea of res judicata:

(1) The state court had jurisdiction of both the persons and subject matter.

(2) The state court action involved the same persons, namely Ernest Tsang and John Joseph Kan (Appelant and Appellee, herein).

(3) The state court action involved the same factual subject matter.

(4) The state court in that action did adjudicate certain facts as between said persons.

(5) That adjudication was appealed by Kan, affirmed by the appellate court and long since has become final.

(6) If there be accepted the facts as adjudicated by the state courts, the monetary relief granted by the district court was contrary to law.

The Appellee's answer thereto (pp. 26 and 27, Brief for Appellee) is:

(1) (p. 26) Res judicata does not apply according to the decision of the Sixth Circuit in *Trailmobile v. Whirls*, 154 Fed. 2d 866.

(2) (p. 27) Tsang "harassed Kan in the State Court by * * * filing a suit for declaratory relief, thus compelling Kan to file a cross-complaint."

The answer to the latter, obviously is that Tsang's complaint in declaratory relief (received in evidence in the district court) averred it was Kan who was making various and sundry charges, that Tsang could not make out what they were and therefore *invited* Kan to state them in open court, or otherwise forever hold his peace; that Kan was represented by two able attorneys (one a former superior court judge); that knew they could have moved the case to the United States District Court (Tr. p. 105), but voluntarily elected to, and did, voluntarily submit their issues to the superior court by an answer affirmatively setting up Kan's claims for damages.

That leaves for disposition, just the one question of whether there is anything in the *Trailmobile decision* that distinguishes the law of res judicata as stated in the plethora of authority contained in our Opening Brief (pp. 9-15).

We urge that *Trailmobile v. Whirls* is patently inapplicable. In the first place, the factual situation was completely different. The state court action was not between the same parties, but was a "class action" brought by one Hess on behalf of all persons similarly situated.

That portion of the *Trailmobile* opinion dealing with the point of res judicata, commences on page 871, headnote

(6). Its holding affirming the district court can be epitomized:

> (1) "The interpretation by the state court of the rights of a citizen under a federal statute is not binding upon the federal courts." (p. 871)
>
> (2) "There is another ground * * * The Hess case was not an appropriate class action in which the judgment entered could be binding upon Whirls, inasmuch as he was not similarly situated with all the parties in whose behalf the class action was instituted in the state court by Hess * * *." (pp. 871-2)

In considering its first and main point, there should be noted that this opinion contains no citation of authority for the quoted assertion; that it bears no approval of the United States Supreme Court in that the latter reversed the judgment* (Appellee's Brief, p. 26). Most particularly it should be appreciated that the quoted tenet is limited to "rights," (i.e. questions of law), and not to adjudications of facts.

From the inception of this case in the federal jurisdiction, by our answer filed and ever since, we have emphasized that we depend our special defense upon the state court's adjudication of historical facts and not its adjudication of legal rights incident thereto.†

The findings of *fact* made by the state court were received in evidence in the district court, pursuant to our

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*The reversal was not as cited in Appellee's Brief p. 26, but 331 U.S. 40. The opinion there of Judge Rutledge is worthy of note.

†"Our primary contention always has been and now is that the findings of the State Court as to the *facts* precluded the Federal or any other court from subsequently finding those facts to be to the contrary; * * *." (Opening Brief, p. 7).

plea of res judicata. Heretofore they have been summarized (Opening Brief, p. 5), including that the partnership had offered Kan, within three months after his return from service, his same job and that Kan refused to accept it; that Kan had never offered to return and Kan had suffered no damages whatsoever; that Kan was an unfit person to be reemployed, judging by his actions following his release from the army.

Well may it be as stated in the *Trailmobile case,* that a state court may not oust the federal court of the latter's perogative of adjudicating the legal rights arising under a federal statute. Nowhere does it purport to claim, however, that the latter is not bound by a state court adjudication of the factual relations between two of its citizens voluntarily submitting their controversy.

The whole distinction is highlighted (to the favor of our contention) by the district court's opinion filed in this case, where it is quoted in Appellee's Brief (p. 27):

> "* * * this finding (of the state court) cannot bind a federal court * * *. The question for decision is then one of fact * * *."

In other words, the district judge construed the *Trailmobile decision* as authority that the superior court's *findings of fact* were not binding on him. We cannot agree that the Sixth Circuit made any such holding.

As to the second point of the *Trailmobile decision,* the only one to which detailed consideration was given in the opinion, it held that the previous suit by Hess did not bind Whirls. To the contrary, in the present case the state court action was between the identical persons as in the present suit.